

**United States Bankruptcy Court
Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

Wednesday, January 12, 2022

Hearing Room 1568

10:00 AM

2:18-20151 Verity Health System of California, Inc.

Chapter 11

Adv#: 2:20-01616 Official Committee of Unsecured Creditors of Verit v. Bluemountain

#1.00 HearingRE: [125] Motion to Dismiss Adversary Proceeding /Notice of Motion and Motion to Dismiss Second Amended Complaint (Bennett, Bruce)

Docket 125

Tentative Ruling:

1/11/2022

Note: Telephonic Appearances Only. The Courtroom is undergoing renovation and will be unavailable for in-court appearances. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing. The cost for persons representing themselves has been waived.

For the reasons set forth below, the Liquidating Trustee's claims against NantWorks, LLC and David Sachs are **DISMISSED WITH PREJUDICE**.

Pleadings Filed and Reviewed:

- 1) Second Amended Complaint For: (1) Avoidance and Recovery of Fraudulent Transfers; (2) Avoidance and Recovery of Preferential Transfers; (3) Preservation of Avoided Transfers; (4) Disallowance of Claims; and (5) Declaratory Relief [Adv. Doc. No. 110] (the "SAC")
- 2) Notice of Motion and Motion to Dismiss Second Amended Complaint [filed by NantWorks LLC and David Sachs] [Adv. Doc. No. 125] (the "Motion to Dismiss")
 - a) Request for Judicial Notice in Support of Defendants NantWorks, LLC and David Sachs's Motion to Dismiss the Second Amended Complaint [Adv. Doc. No. 126]
- 3) Opposition to Motion to Dismiss Second Amended Complaint Filed by Defendants NantWorks LLC and David Sachs [Adv. Doc. No. 143] (the "Opposition")
- 4) Reply in Further Support of Motion to Dismiss Second Amended Complaint [Adv. Doc. No. 146] (the "Reply")

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I. Facts and Summary of Pleadings

A. Background

On August 31, 2018 (the "Petition Date"), Verity Health System of California, Inc. ("VHS") and certain of its subsidiaries (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors' Chapter 11 cases are being jointly administered. On August 14, 2020, the Court confirmed the *Modified Second Amended Joint Chapter 11 Plan of Liquidation (Dated July 2, 2020) of the Debtors, the Prepetition Secured Creditors, and the Committee* [Bankr. Doc. No. 5468, Ex. A] (the "Plan"). Bankr. Doc. No. 5504 (the "Confirmation Order"). The Plan provides for the creation of a Liquidating Trust which is required to, among other things, prosecute avoidance actions. Howard Grobstein has been appointed as the Liquidating Trustee.

On August 28, 2020, the Official Committee of Unsecured Creditors (the "Committee") filed the complaint commencing this adversary proceeding. The action is now being prosecuted by the Liquidating Trustee, as successor-in-interest to the Committee.

On February 5, 2021, the Court denied motions to dismiss the First Amended Complaint filed by (1) Integrity Healthcare, LLC ("Integrity") and (2) Assured Investment Management, LLC (fka BlueMountain Capital Management) ("Assured") and its affiliates. Adv. Doc. Nos. 69–71 and 76–77.

On October 8, 2021, the Liquidating Trustee filed the operative Second Amended Complaint. Integrity filed an Answer to the Second Amended Complaint on November 15, 2021. Adv. Doc. No. 128.

NantWorks, LLC ("NantWorks") and David Sachs ("Sachs") move to dismiss the Second Amended Complaint. The Liquidating Trustee opposes the Motion to Dismiss.

B. Summary of the Second Amended Complaint

1. Allegations

The allegations of the Second Amended Complaint may be summarized as follows: From 2002 through 2015, the hospitals that were owned and operated by VHS as of the Petition Date were owned and operated by the Daughters of Charity of St. Vincent de Paul, Province of the West, a nonprofit charitable organization backed by the Catholic Church, and were known as the Daughters of Charity Health System ("DCHS"). SAC at ¶ 35.

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In early 2014 DCHS began evaluating "strategic alternatives for the health system." *Id.* at ¶ 39. In October 2014, DCHS entered into an agreement with Prime Healthcare Foundation ("Prime"), under which Prime would purchase DCHS (the "Prime Transaction"). *Id.* In early 2015, the California Attorney General (the "Attorney General") approved the Prime Transaction, subject to certain conditions. *Id.* In 2015, Prime terminated the Prime Transaction after determining that the conditions imposed by the Attorney General were unduly onerous. *Id.*

Following the termination of the Prime Transaction, DCHS continued to seek other potential buyers. *Id.* at ¶ 40. In 2015, DCHS selected BlueMountain Capital, a private investment firm, to recapitalize its operations and transfer leadership of the health system to VHS (the "BlueMountain Transaction"). *Id.* As part of that recapitalization, DCHS entered into a System Restructuring and Support Agreement, dated July 15, 2015 (the "Restructuring Agreement"), with BlueMountain Capital and its affiliates. Pursuant to the Restructuring Agreement, DCHS changed its name to VHS and entered into a Health System Management Agreement (the "Management Agreement") with Integrity. *Id.* at ¶ 44. Integrity is wholly-owned by BlueMountain. *Id.* at ¶ 3.

The Management Agreement called for Integrity to provide oversight, supervision, direction, implementation, or performance services with respect to a broad range of management services and authorized Integrity to employ any number of personnel to provide the services called for under the Management Agreement. *Id.* at ¶ 45. To that end, Integrity employed and provided to VHS four c-suite executives—a Chief Executive Officer ("CEO"), Chief Operating Officer ("COO"), Chief Financial Officer ("CFO"), and Director of Medical and Clinical Affairs (the "CMO")—to perform essentially all the management services under the Management Agreement. *Id.* at ¶ 46.

In exchange for those services, the Management Agreement required VHS to incur obligations to Integrity for management fees equal to one-twelfth of 4.00% of VHS's annual operating revenues, adjusted for inflation. *Id.* at ¶ 47. Between the effective date of the Management Agreement and the Petition Date, VHS had paid \$66,116,432 in Management Fees to Integrity and had deferred payment of an additional \$96,228,036 in Management Fees. *Id.* at ¶ 51. The term of the Management Agreement extended through 2030, and had it remained in place it would have resulted in VHS paying Integrity hundreds of millions of dollars of additional Management Fees over the life of the contract. *Id.* at ¶ 55. All or a significant portion of the Management Fees paid by VHS to Integrity under the Management Agreement were then transferred by Integrity to BlueMountain through upstream payments by

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virtue of BlueMountain's ownership of Integrity. *Id.* at ¶ 5.

In July 2017, NantWorks acquired a controlling interest in Integrity. *Id.* at ¶ 57. From the time of the NantWorks acquisition of Integrity to the Petition Date, after receiving Management Fees from VHS, Integrity subsequently transferred a substantial portion of those fees to certain individuals (the "Individual Defendants"). [Note 1] *Id.* at ¶ 58. David Sachs was one of the recipients of these transfers. *Id.*

The Debtors did not receive reasonably equivalent value in exchange for the Management Fee obligations imposed by the Management Agreement. *Id.* at ¶ 6. By way of example, after the Debtors entered chapter 11, they promptly rejected the Management Agreement and hired the same four executives directly at salaries totaling only \$3.1 million annually—roughly \$55 million less than the Debtors were obligated to pay under the Management Agreement for the same executives performing substantially the same services. *Id.*

2. Claims for Relief

Based on the foregoing allegations, the Second Amended Complaint seeks the following relief as to both NantWorks and David Sachs: (1) avoidance of the Management Fees transferred to NantWorks and Sachs as constructively fraudulent transfers (Claims II–III); (2) avoidance of the Management Fees transferred to NantWorks and Sachs within the preference period as preferential transfers (Claims IV–V); and (3) a request for a determination that the amounts avoided be preserved for the benefit of the estate (Claim VI).

C. The Court's Prior Ruling Denying Integrity's Motion to Dismiss

As noted above, on February 5, 2021, the Court denied Integrity's Motion to Dismiss the First Amended Complaint. In support of that Motion, Integrity argued that the Liquidating Trustee's claims against it had been released by the Plan. The Court rejected Integrity's arguments:

The release provisions contained in § 13.5(d) of the Plan and § 15 of the Plan Settlement did not release the Liquidating Trustee's claims against Integrity. The interpretation of § 13.5(d) advocated by Integrity would completely read § 13.9(a)(xii) out of the Plan. Section 13.9(a)(xii) clearly specifies that *all* claims against Integrity are preserved:

Except as provided in Section 7.1 hereof, nothing contained in this

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Plan shall be deemed a waiver or relinquishment of any claims or Causes of Action of the Debtors that are not settled with respect to Allowed Claims or specifically waived or relinquished by this Plan, which shall vest in the Liquidating Trust, subject to any existing valid and perfected security interest or lien in such Causes of Action. The Causes of Action preserved hereunder include, without limitation, claims, rights or other causes of action: ... (xii) *all claims* against Integrity Healthcare, LLC and BlueMountain Capital Management LLC.

Section 13.9(a)(xii) (emphasis added).

Integrity argues that § 13.9(a)(xii) does not mean what it says—that the Plan does not preserve *all* claims against Integrity. To make this argument, Integrity relies upon the final sentence in § 13.5(d), which provides that "Claims against any Released Party that are released pursuant to this Section 13.5(d) shall be deemed waived and relinquished by this Plan for purposes of Section 13.9." According to Integrity, this language means that the Plan discharges any claim against Integrity except for claims for gross negligence or willful misconduct.

The Court declines to adopt Integrity's interpretation, because it does not square with the plain language of § 13.9(a)(xii). As noted above, § 13.9(a)(xii) preserves *all claims* against Integrity—not the preservation of only claims for gross negligence or willful misconduct. Had the Plan Proponents intended the result advocated by Integrity, they could have easily drafted § 13.9(a)(xii) to state that "[t]he Causes of Action preserved hereunder include ... (xii) only those claims arising from gross negligence or willful misconduct against Integrity Healthcare, LLC and BlueMountain Capital Management LLC." That is not what § 13.9(a)(xii) says.

Reading the Plan such that the Liquidating Trustee's claims against Integrity are preserved gives meaning to both § 13.9 and the final sentence of § 13.5(d). Under this interpretation, the final sentence of § 13.5(d) means that any claims that are not expressly preserved in § 13.9 are deemed waived and relinquished. Because a confirmed Plan is a contract, the Court must read the Plan in a manner that gives meaning to each of its provision. *See Cree v. Waterbury*, 78 F.3d 1400, 1405 (9th Cir.1996) ("a court must give effect to every word or term employed by the parties and reject none as meaningless or

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surplusage . . .").

Integrity's assertion that claims against it were released by § 15 of the Plan Settlement fails because such an interpretation of § 15 would also read § 13.9(a)(xii) out of the Plan. In addition, the construction advocated by Integrity is not consistent with the plain language of § 15 of the Plan Settlement. Specifically, the releases set forth in § 15 are prefaced by the qualifier "*except as expressly provided in the Plan*" Plan Settlement at § 15. Since § 13.9(a)(xii) expressly provides that the Plan does *not* release claims against Integrity, this prefatory qualifying languages renders § 15 of the Plan Settlement inapplicable to Integrity.

Final Ruling Denying Integrity's Motion to Dismiss [Adv. Doc. No. 71] at 12–13.

D. Summary of Papers Filed in Connection with the Motion to Dismiss Filed by NantWorks and Sachs

NantWorks and Sachs (collectively, "Movants") move to dismiss the Second Amended Complaint for failure to state a claim upon which relief can be granted. First, Sachs argues that the Liquidating Trustee's claims against him have been released by § 13.5(d) of the Plan. Sachs contends that the reasoning in the Court's ruling as to Integrity (the "Integrity Ruling") does not apply to him. He notes that the Integrity Ruling relied upon a construction of § 13.9(a)(xii) of the Plan, whereas the provision applicable to him is set forth in § 13.9(a)(x).

Second, Movants argue that the claims against them have been released by the Plan Settlement. NantWorks asserts that it falls within the scope of the Plan Settlement because it is an affiliate of Verity MOB Financing, LLC and Verity MOB Financing II, LLC (the "MOB Financing Parties"), who were parties to the Plan Settlement.

Third, Movants argue that the Second Amended Complaint does not sufficiently allege that NantWorks was "the entity for whose benefit" any of the alleged transfers to Integrity were made. Movants note that NantWorks had no involvement with either VHS or Integrity at the time the Management Agreement was negotiated and executed. According to Movants, the fact that NantWorks was not a party to the Management Agreement at the time it was executed, and did not become entitled to receive Management Fees until after it acquired a controlling interest in Integrity, means that NantWorks does not qualify as a beneficiary of the Management Fee transfers for purposes of § 550(a)(1).

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In opposition to the Motion to Dismiss, the Liquidating Trustee argues that the reasoning in the Integrity Ruling applies with equal force to Movants. He characterizes the Motion to Dismiss as an improper attempt to obtain reconsideration of the Integrity Ruling.

With respect to the argument that NantWorks does not qualify as a beneficiary of the Management Fee transfers for purposes of § 550(a)(1), the Liquidating Trustee asserts that it is irrelevant that NantWorks was not involved in the negotiation or execution of the Management Agreement. He contends that the appropriate focus for the fraudulent transfer analysis is whether NantWorks benefited from the specific transfers that the Liquidating Trustee seeks to avoid.

II. Findings and Conclusions

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citations omitted). To state a plausible claim for relief, a complaint must satisfy two working principles:

First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice.... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."

Id. (citing Civil Rule 8(a)(2)).

Although the pleading standard Civil Rule 8 announces "does not require 'detailed factual allegations,' ... it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.... A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual

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enhancement.”” *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Section 13.9(a)(x) of the Plan provides:

Except as provided in Section 7.1 hereof, nothing contained in this Plan shall be deemed a waiver or relinquishment of any claims or Causes of Action of the Debtors that are not settled with respect to Allowed Claims or specifically waived or relinquished by this Plan, which shall vest in the Liquidating Trust, subject to any existing valid and perfected security interest or lien in such Causes of Action. The Causes of Action preserved hereunder include, without limitation, claims, rights or other causes of action: ... (x) that constitute Avoidance Actions.

Plan at § 13.9(a)(x).

“Avoidance Actions” is defined as “any Causes of Action arising under any section of chapter 5 of the Bankruptcy Code, including, without limitation, §§ 502, 510, 541, 542, 543, 544, 545, 547, 548, 549, 550, 551, and 553 or under similar or related state or federal statutes and common law, including state fraudulent transfer laws.” Plan at § 1.19.

Section 7.1 states that “entry of the Confirmation Order shall constitute the Bankruptcy Court’s approval, as of the Effective Date, of the Plan Settlement by and between the Debtors, the Prepetition Secured Creditors, and the Committee.” Plan at § 7.1(a). The MOB Financing Parties are among the Prepetition Secured Creditors and so are parties to the Plan Settlement.

NantWorks is an affiliate of the MOB Financing Parties. *See* Disclosure Statement Describing Second Amended Joint Chapter 11 Plan of Liquidation (Dated July 2, 2020) of the Debtors, the Prepetition Secured Creditors, and the Committee [Bankr. Doc. No. 4994] (the “Disclosure Statement”) at 25 (“The secured lenders for the MOB Financings are affiliates of NantWorks, which is an affiliate of Integrity”). **[Note 2]**

The Plan Settlement contains the following release provision (emphasis added):

Upon the occurrence of the Effective Date and the distributions required to be made on such date under the Plan, except as expressly provided in the Plan or otherwise agreed by the Parties in writing, the Parties shall, and hereby do, fully, finally, unconditionally, irrevocably and completely release and forever discharge each other and each of their predecessors, successors (including, without limitation, any chapter 11 or chapter 7 trustee of the Debtors or their

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estates), assigns, *affiliates*, subsidiaries, parents, partners, constituents, officers, directors, employees, attorneys and agents (past, present or future) and each of their respective heirs, successors, and assigns, of and *from any and all claims* (including, but not limited to any claims made or which could have been made against the defendants in the Adversary Proceedings, any Challenge brought or which could have been brought, or any objection to the fees and expenses incurred by the Committee's advisors, as set forth more fully in Paragraphs 10 through 12 hereof), causes of action, litigation claims, *avoidance actions (including those that may arise under Chapter 5 of the Bankruptcy Code)* and any other debts, obligations, rights, suits, damages, actions, remedies, judgments and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, liquidated or unliquidated, fixed or contingent, matured or unmatured, in law or at equity, whether for tort, contract or otherwise, based in whole or in part upon any act or omission, transaction, event or other occurrence or circumstance existing, whether arising from or in any way related to the Debtors, their assets or property, the Chapter 11 Cases, or any aspect thereof; provided, that nothing in this Agreement shall release any Party from its obligations under the Plan, the Liquidating Trust Agreement, or this Agreement.

Plan Settlement at ¶ 15.

Section 13.5(d) of the Plan contains the following release provision:

Debtors' Releases. Pursuant to § 1123(b), and except as otherwise specifically provided in this Plan, for good and valuable consideration, including the service of the Released Parties to facilitate the expeditious liquidation of the Debtors and the consummation of the transactions contemplated by this Plan, on and after the Effective Date, the Released Parties are deemed released and discharged by the Debtors and their Estates from any and all claims, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, including any derivative claims asserted or assertable on behalf of the Debtors, whether known or unknown, foreseen, or unforeseen, existing or herein after arising in law, equity, or otherwise, that the Debtors or their Estates would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim or other Person, based on or relating to, or in any manner arising from, in whole or in

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part, the operation of the Debtors prior to or during the Chapter 11 Cases, the transactions or events giving rise to any Claim that is treated in this Plan, the business or contractual arrangements between the Debtors and any Released Party, the restructuring of Claims before or during the Chapter 11 Cases, the marketing and the sale of Assets of the Debtors, the negotiation, formulation, or preparation of this Plan, the Disclosure Statement, or any related agreements, instruments, or other documents, other than a Claim against a Released Party arising out of the gross negligence or willful misconduct of any such person or entity. Claims against any Released Party that are released pursuant to this Section 13.5(d) shall be deemed waived and relinquished by this Plan for purposes of Section 13.9.

Plan at § 13.5(d).

"Released Party" is defined as "individually and collectively, the Estates, the Debtors, the Committee, the members of the Committee, the Indenture Trustees and their affiliates, and each current and/or former member, manager, officer, director, employee, counsel, advisor, professional, or agents of each of the foregoing who were employed or otherwise serving in such capacity before or after the Petition Date." Plan at § 1.147.

A. The Liquidating Trustee's Claims Against Sachs Were Released by § 13.5(d) of the Plan

Sachs served as VHS's Chief Financial officer from August 2017 to August 2018. *See* Debtors' Statement of Financial Affairs [Bankr. Doc. No. 514] at ¶ 26a.3. Because he was a "former ... officer" of VHS, Plan at § 1.147, Sachs is a "Released Party" within the meaning of the Plan.

Section 13.5(d) of the Plan releases the Liquidating Trustee's claims against Sachs. That provision releases Sachs from "any and all claims ... in any manner arising from ... the operation of the Debtors *prior to* ... the Chapter 11 Cases" (emphasis added). This encompasses the Liquidating Trustee's claim that funds transferred first to NantWorks and then to Sachs are avoidable as a constructively fraudulent transfer.

Contrary to the Liquidating Trustee's argument, § 13.9(a)(x) of the Plan does not trump § 13.5(d) and preserve the Liquidating Trustee's claims against Sachs. Section 13.9(a)(x) preserves "claims, rights or other causes of action ... that constitute Avoidance Actions." However, § 13.9(a)(x) is qualified by § 13.5(d), which makes

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clear that "[c]laims against any Released Party that are released pursuant to this Section 13.5(d) shall be deemed waived and relinquished by this Plan for purposes of Section 13.9."

The Integrity Ruling addressed the interplay between § 13.5(d) and § 13.9(a), but that ruling specifically dealt with § 13.9(a)(xii), as opposed to § 13.9(a)(x), the provision at issue here. There are key differences between § 13.9(a)(x) and § 13.9(a)(xii). Section 13.9(a)(xii) specifically carves out and preserves the Liquidating Trustee's claims against Integrity and BlueMountain, and it does so by naming both entities: "The Causes of Action preserved hereunder include, without limitation, claims, rights or other causes of action: ... (xii) *all claims* against Integrity Healthcare, LLC and BlueMountain Capital Management LLC." § 13.9(a)(xii) (emphasis added). Section 13.9(a)(x), by contrast, contains only generalized language preserving all "Avoidance Actions." That section does not specifically name Sachs.

In ruling that the Liquidating Trustee's claims against Integrity were preserved, the Court relied upon the specific language in § 13.9(a)(xii) that expressly named Integrity. There is no comparable provision in § 13.9(a)(x) naming Sachs. The difference between subclauses (x) and (xii) compel different conclusions regarding the applicability of the Plan's release provisions as to Sachs and Integrity. It is not the case, as the Liquidating Trustee contends, that the Court's findings as to Integrity must also apply to Sachs.

The Liquidating Trustee argues that the provisions of § 13.9(a)(x) and § 13.5(d) conflict, and that this alleged conflict must be resolved in his favor. The Liquidating Trustee notes that where general release language is followed by specific exclusionary language, the specific language takes precedence over the general. In the Trustee's characterization, § 13.9(a)(x) contains specific exclusionary language that should prevail over the more general release language set forth in § 13.5(d).

In the Court's view, there is no conflict or ambiguity between § 13.9(a)(x) and § 13.5(d). However, even if some conflict or ambiguity was present, the outcome would *not* be an interpretation of the Plan that favored the Liquidating Trustee by preserving his claims against Sachs. As the Liquidating Trustee correctly observes, a "Chapter 11 bankruptcy plan is essentially a contract between the debtor and his creditors, and must be interpreted according to the rules governing the interpretation of contracts." *Miller v. United States*, 363 F.3d 999, 1004 (9th Cir. 2004). What the Liquidating Trustee fails to account for is the canon that "that ambiguous contract provisions should be construed against the drafter." *Int'l Bhd. of Teamsters v. NASA*

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Servs., Inc., 957 F.3d 1038, 1042 (9th Cir. 2020). The Liquidating Trustee brings this action as successor-in-interest to the Debtors, who participated in the drafting of the Plan. To the extent that there is any conflict or ambiguity between § 13.9(a)(x) and § 13.5(d), that conflict or ambiguity must be resolved *against* the Liquidating Trustee and in favor of Sachs.

Because the Liquidating Trustee's claims against Sachs have been released by the Plan, those claims are **DISMISSED WITH PREJUDICE**. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (holding that the Court may dismiss a complaint without leave to amend where any amendment would be futile).

B. The Liquidating Trustee's Claims Against NantWorks Were Released By the Plan Settlement

The release provision set forth in § 15 of the Plan Settlement applies to all affiliates of parties to the Plan Settlement. As noted above, NantWorks is an affiliate of the MOB Financing Parties, who are parties to the Plan Settlement. Therefore, the release contained in § 15 of the Plan Settlement applies to NantWorks. The Plan Settlement releases NantWorks from "avoidance actions (including those that may arise under Chapter 5 of the Bankruptcy Code)." Consequently, the Liquidating Trustee's avoidance claims against NantWorks have been released.

The releases set forth in § 15 of the Plan settlement are prefaced by the qualifier "*except as expressly provided in the Plan*" Plan Settlement at § 15 (emphasis added). Consequently, had the Plan contained a provision expressly preserving the Liquidating Trustee's claims against NantWorks, NantWorks would not be able to avail itself of the Plan Settlement's release. In finding that the Liquidating Trustee's claims against Integrity had *not* been released, the Court noted that § 13.9(a)(xii) of the Plan contained an express provision preserving claims against Integrity.

The Plan contains no similar express provision preserving the Liquidating Trustee's claims against NantWorks. Section 13.9(a)(x), which according to the Liquidating Trustee preserves the claims against NantWorks, refers only to "causes of action ... that constitute Avoidance Actions." In the absence of an express provision excepting NantWorks from the protections conferred by the Plan Settlement, the Court cannot find that the claims against NantWorks have been preserved.

The Court does not believe that there is any conflict or ambiguity between § 15 of the Plan Settlement and § 13.9(a)(x) of the Plan. However, as discussed in Section II.B., above, to the extent that any conflict or ambiguity is present, it must be resolved

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against the Liquidating Trustee and in favor of NantWorks.

Because the Liquidating Trustee's claims against NantWorks have been released by the Plan Settlement, those claims are **DISMISSED WITH PREJUDICE**. *See Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1041 (9th Cir. 2011) (holding that the Court may dismiss a complaint without leave to amend where any amendment would be futile).

III. Conclusion

Based upon the foregoing, the Liquidating Trustee's claims against NantWorks, LLC and David Sachs are **DISMISSED WITH PREJUDICE**. The Court will prepare and enter an appropriate order.

No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Landon Foody or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1

Upon the motion of the Liquidating Trustee, the Court sealed the allegations specifying the dollar amount of the Management Fees transferred to the Individual Defendants.

Note 2

Page citations are to the CM/ECF pagination appearing at the top of each page, not the pagination used by the document's preparer.

Party Information

Debtor(s):

Verity Health System of California,

Represented By
Samuel R Maizel
John A Moe II
Tania M Moyron

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Claude D Montgomery
Sam J Alberts
Shirley Cho
Patrick Maxcy
Steven J Kahn
Nicholas A Koffroth
Kerry L Duffy
Brigette G McGrath
Gary D Underdahl
Nicholas C Brown
Anna Kordas
Mary H Haas
Robert E Richards
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Defendant(s):

Mitchell Creem, Stephen Forney,

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Keith C Owens

NantWorks, LLC

Represented By
Bruce Bennett
Anna Kordas

Berge Badalian

Pro Se

Mitchell Creem

Pro Se

Stephen Fomey

Pro Se

Glenn Marshack

Pro Se

Anthony Armada

Pro Se

Andrei Soran

Pro Se

David Sachs

Represented By
Bruce Bennett

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CONT... Verity Health System of California, Inc.

Chapter 11

Anna Kordas

John Doe Companies 1-50

Pro Se

John Doe Individuals 1-50

Pro Se

Assured Investment Management

Represented By
Chet Kronenberg
Alan C Turner
William T Russell Jr
Sandeep Qusba
Thomas M Cramer

BMSB L.P.

Represented By
Chet Kronenberg

Integrity Healthcare, LLC

Represented By
Bruce Bennett
Danielle R Leneck

Bluemountain Monteners Master

Represented By
Chet Kronenberg

Bluemountain Logan Opportunities

Represented By
Chet Kronenberg

Bluemountain Foinaven Master

Represented By
Chet Kronenberg

Bluemountain Summit Opportunities

Represented By
Chet Kronenberg

Bluemountain Guadalupe Peak Fund

Represented By
Chet Kronenberg

Plaintiff(s):

Official Committee of Unsecured

Represented By
Steven J. Katzman

Trustee(s):

Howard Grobstein Liquidating

Represented By

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Verity Health System of California, Inc.

James Cornell Behrens

Chapter 11

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2:21-16276 GIA Development, LLC

Chapter 11

#2.00 Status Hearing

RE: [1] Chapter 11 Involuntary Petition Against an Individual. LLC : AVFUND
CAPITAL GROUP, INC. (attorney William H Brownstein). (Brownstein, William)

FR. 9-21-21; 10-5-21

Docket 1

***** VACATED *** REASON: DISMISSED 1-3-22**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

GIA Development, LLC

Pro Se

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2:21-16276 GIA Development, LLC

Chapter 11

#3.00 Hearing
RE: [10] Motion to Dismiss Petition or for Relief from the Automatic Stay
fr. 10-5-21

Docket 10

***** VACATED *** REASON: DISMISSED 1-3-22**

Tentative Ruling:

- NONE LISTED -

Party Information

Debtor(s):

GIA Development, LLC

Pro Se

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2:20-15501 Chineseinvestors.com, Inc.

Chapter 7

#100.00 HearingRE: [439] Motion to Sell Property of the Estate Free and Clear of Liens under Section 363(f) Notice of Motion and Motion For Order: (A) Authorizing The Sale Of 400,000 Shares of GrowFlow Corp. Stock Outside The Ordinary Course Of Business, Free And Clear Of Claims, Liens, Encumbrances, And Interests; and (B) Approving The Form And Manner Of Notice And Bid Process; Memorandum Of Points And Authorities; Declarations Of Peter J. Mastan, Ashleigh A. Danker, And Peter Lucey In Support Thereof; And Exhibits. (Danker, Ashleigh)

Docket 439

Tentative Ruling:

1/11/2022

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For the reasons set forth below, the Sale Motion is **GRANTED**. In the event any qualified overbidders are present, the Court will conduct the auction in accordance with the procedures set forth herein.

Key Sale Terms:

- 1) Proposed purchaser: Late Harvest III, LLC
- 2) Property for sale: 400,000 shares of GrowFlow Corporation stock
- 3) Purchase price: \$75,000
- 4) Overbids: The initial overbid shall be \$80,000. Subsequent overbids shall be in increments of \$5,000, subject to adjustment by the Court to facilitate bidding.

Pleadings Filed and Reviewed:

- 1) Notice of Motion and Motion for Order: (A) Authorizing the Sale of 400,000 Shares of Growflow Corp. Outside the Ordinary Course of Business, Free and Clear of Claims, Liens, Encumbrances, and Interests; and (B) Approving the Form

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CONT... Chineseinvestors.com, Inc.

Chapter 7

and Manner of Notice and Bid Process [Doc. No. 439] (the "Sale Motion")

a) Notice of [Sale Motion] [Doc. No. 440]

b) Notice of Sale of Estate Property

2) No opposition is on file as of the date of issuance of this tentative ruling

I. Facts and Summary of Pleadings

On June 19, 2020 (the "Petition Date"), ChineseInvestors.com (the "Debtor") filed a voluntary Chapter 11 petition. The Debtor is a financial information web portal that offers news and information regarding financial markets in Chinese. On January 25, 2021, the Court entered an order converting this case to one under Chapter 7. Doc. No. 310. Peter J. Mastan was appointed the Chapter 7 Trustee (the "Trustee") on January 27, 2021. Doc. No. 312.

The Trustee seeks authorization to sell 400,000 shares of GrowFlow Corporation stock (the "Shares") to Late Harvest III, LLC (the "Late Harvest"). The purchase price is \$75,000, and the sale is subject to overbids.

As of the date of issuance of this tentative ruling, no opposition to the Sale Motion is on file.

II. Findings and Conclusions

A. The Court Grants the Sale Motion

Section 363(b) authorizes the sale of estate property out of the ordinary course of business, subject to court approval. The estate representative must articulate a business justification for the sale. *In re Walter*, 83 B.R. 14, 19–20 (9th Cir. BAP 1988). Whether the articulated business justification is sufficient "depends on the case," in view of "all salient factors pertaining to the proceeding." *Id.* at 19–20.

The Trustee is obligated to "collect and reduce to money the property of the estate" and "close such estate as expeditiously as is compatible with the best interests of parties in interest." § 704(a)(1). The Court finds that the Trustee's decision to sell the Shares is consistent with his statutory obligation and is an exercise of his reasonable business judgment. The sale will generate net proceeds of at least \$75,000 for the estate.

The Court approves the overbid procedures set forth in the Sale Motion. Having reviewed the declarations of Peter J. Mastan, Ashleigh A. Danker, and Peter Lucey, the Court finds that Late Harvest is a good-faith purchaser entitled to the protections of § 363(m). In the event that an overbidder prevails at the auction, the Court will take testimony from such overbidder to determine whether §363(m) protections are

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Chapter 7

warranted.

Notwithstanding Bankruptcy Rule 6004(h), the order approving the sale shall take effect immediately upon entry. Pursuant to Bankruptcy Rule 6004(f)(2), the Trustee is authorized to execute any instruments reasonably necessary to consummate the sale.

B. Auction Procedures

In the event that any qualified overbidders are present, the Court will conduct the auction in accordance with the following procedures. The initial overbid shall be \$80,000, with subsequent overbids to be in increments of \$5,000. The overbid increment is subject to adjustment by the Court to facilitate bidding. The Court will announce each bid level; however, parties are free to submit bids in excess of the bid level announced by the Court. To remain in the auction, bidders must participate at all bid levels. That is, parties who do not bid in a round cannot later change their minds and re-enter the auction.

III. Conclusion

Based upon the foregoing, the Sale Motion is **GRANTED**. Within seven days of the hearing, the Trustee shall submit an order incorporating this tentative ruling by reference.

Party Information

Debtor(s):

Chineseinvestors.com, Inc.

Represented By
James Andrew Hinds Jr
Rachel M Sposato

Trustee(s):

Peter J Mastan (TR)

Represented By
Ashleigh A Danker

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2:21-19229 DLJJ & Associates, LLC

Chapter 11

#101.00 HearingRE: [24] Motion to Dismiss Debtor

Docket 24

Tentative Ruling:

1/11/2022

Note: Telephonic Appearances Only. The Courtroom is undergoing renovation and will be unavailable for in-court appearances. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing. The cost for persons representing themselves has been waived.

For the reasons set forth below, the Court finds that the Debtor filed the petition in bad faith and **GRANTS** Preferred's Motion to Dismiss. By separate order, the Court will require the Debtor to show cause why the Court should not (1) enter an order granting *in rem* relief as to the Marina Property and (2) imposing a 180-day re-filing bar.

Pleadings Filed and Reviewed:

- 1) Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112 [and] For Sanctions [Pursuant to] 11 U.S.C. § 105 [Doc. No. 24] (the "Motion to Dismiss")
 - a) Declaration of Michael E. Bubman in Support of Preferred Bank's Motion to Dismiss [Doc. No. 25]
 - b) Declaration of Robert J. Kosof in Support of Preferred Bank's Motion to Dismiss Bankruptcy Case [Doc. No. 26]
 - c) Declaration of Marsha Houston in Support of Preferred Bank's Motion to Dismiss Bankruptcy Case [Doc. No. 27]
 - d) Request for Judicial Notice [Doc. No. 28]
 - e) Notice of [Motion to Dismiss] [Doc. No. 33]
- 2) Bank Hapoalim's Joinder to Preferred Bank's Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112(b) [Doc. No. 40]
- 3) Opposition by Debtor DLJJ & Associates, LLC to [Motion to Dismiss] [Doc. No. 43]

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DLJJ & Associates, LLC

Chapter 11

- a) Debtor DLJJ's Request for Judicial Notice in Support of Opposition to Preferred Bank's Motion to Dismiss Case [Doc. No. 42]
- 4) Co-Obligor 1604 Sunset Plaza, LLC's Opposition to Preferred Bank's Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112(b) [Doc. No. 41]
- 5) Bank Hapoalim's Reply to Debtor's Opposition to Preferred Bank's Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112(b) [Doc. No. 47]
- 6) Daniel Wallace and Hillary Wallace's Joinder to Preferred Bank's Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112(b) [Doc. No. 50]
 - a) Declaration of Daniel E. Engel, Esq. in Support of Daniel Wallace and Hillary Wallace's Joinder to Preferred Bank's Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112(b) [Doc. No. 51]
- 7) Reply of Movant Preferred Bank to Opposition to Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112(b) Filed by 1604 Sunset Plaza, LLC [Doc. No. 55]
 - a) Declaration of Daniel E. Engel, Esq. in Support of Preferred Bank's Reply to 1604 Sunset Plaza, LLC's Opposition to Preferred Bank's Motion to Dismiss Chapter 11 Case [Doc. No. 56]
- 8) Reply Memorandum of Points and Authorities Re Debtor DLJJ & Associates, LLC's Opposition to Preferred Bank's Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112(b) [Doc. No. 57]
 - a) Declaration of Alan M. Mirman in Support of Reply Re Preferred Bank's Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112(b) [Doc. No. 58]
 - b) Evidentiary Objections to Declaration of Annette Rubin [Doc. No. 59]
 - c) Objection to Debtor DLJJ's Request for Judicial Notice [Doc. No. 60]
 - d) Declaration of Cristal Clarke in Support of Preferred Bank's Reply Re Motion to Dismiss Bankruptcy Case Pursuant to 11 U.S.C. § 1112(b) [Doc. No. 61]
 - e) Supplemental Declaration of Michael E. Bubman in Support of Preferred Bank's Reply in Support of Motion to Dismiss [Doc. No. 62]
- 9) Senior Secured Creditor Bank of America, N.A.'s Statement of Position Re Preferred Bank's Motion to Dismiss [Doc. No. 65]

I. Facts and Summary of Pleadings

A. Background

On December 9, 2021, 1604 Sunset Plaza, LLC ("Sunset Plaza") filed a face-sheet voluntary Chapter 11 petition. The sole member of Sunset Plaza is the Stuart and

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CONT... DLJJ & Associates, LLC

Chapter 11

Annette Rubin Family Trust Under Agreement Dated November 3, 2003 (the "Rubin Trust").

On December 10, 2021, Sunset Plaza filed a *Complaint for Injunctive Relief* [Adv. Doc. No. 1] (the "Complaint") against Preferred Bank ("Preferred") and Lenders Foreclosure Services ("Lenders," and together with Preferred, the "Defendants"). The Complaint seeks preliminary and permanent injunctions preventing Defendants from foreclosing upon residential properties located at 4347 Marina Drive, Santa Barbara, CA (the "Marina Property") and 715 N. Alpine Dr., Beverly Hills, CA (the "Alpine Property").

Sunset Plaza is a co-obligor on a business loan (the "Loan") issued to A. Stuart Rubin ("Stuart") [Note 1] by Preferred on August 21, 2017. The Marina Property is *not* property of Sunset Plaza's estate but does secure the Loan. The Loan is also secured by residential property located at 1604 Sunset Plaza Dr., Los Angeles, CA (the "Sunset Plaza Property"), which *is* property of the Sunset Plaza estate.

On December 13, 2021, Sunset Plaza filed an emergency motion (the "Emergency Motion") for issuance of a preliminary injunction staying the December 15, 2021 foreclosure sale of the Marina Property. The Court conducted a hearing on the Emergency Motion on December 14, 2021. On that same date, the Court issued a Memorandum of Decision [Doc. No. 16, Adv. No. 2:21-ap-01245-ER] and accompanying order [Doc. No. 17, Adv. No. 2:21-ap-01245-ER] denying the Emergency Motion. The Court found that Sunset Plaza had failed to show that it would be able to expeditiously sell the Marina Property outside of bankruptcy because multiple obstacles stood in the way of a prompt sale. Those obstacles included two injunctions blocking the sale of the Marina Property and multiple encumbrances that would have to be removed without the benefit of § 363.

On December 14, 2021 at 11:19 p.m. (the "Petition Date")—approximately six hours after the Court issued the Memorandum of Decision and Order denying the Emergency Motion—DLJJ & Associates, LLC (the "Debtor") filed a voluntary Chapter 11 petition. Annette Rubin ("Annette") is the sole member and manager of the Debtor. [Note 1] The Debtor claims to hold a 10% ownership interest in the Marina Property. *See* Schedule A/B: Assets—Real and Personal Property [Doc. No. 63] at ¶ 55.1. The Debtor's claimed ownership interest in the Marina Property is based upon a Grant Deed recorded by Annette on December 13, 2021 at 10:30 a.m. (the "Dec. 2021 Grant Deed"), which purports to transfer a 10% interest in the Marina Property from Annette to the Debtor.

The Dec. 2021 Grant Deed is not the first attempted transfer involving the Debtor

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and the Marina Property. On February 3, 2021, Stuart recorded a Grant Deed purporting to transfer an 80% interest in the Marina Property to the Debtor (the "Feb. 2021 Grant Deed"). On June 25, 2021, the Riverside Superior Court held Stuart in contempt for executing the Feb. 2021 Grant Deed and ordered him to unwind the transfer. Doc. No. 27, Ex. C. A Grant Deed unwinding the Feb. 2021 Grant Deed and transferring the Marina Property back to the Rubins was executed on July 28, 2021. Doc. No. 27, Ex. D.

B. Summary of Papers Filed in Connection with Preferred's Motion to Dismiss

Preferred moves to dismiss the Debtor's case as a bad-faith filing, pursuant to § 1112(b). Preferred argues that the case was filed solely to further delay the December 15, 2021 foreclosure sale after the Court denied Sunset Plaza's Emergency Motion for issuance of a preliminary injunction. As indicia of the Debtor's bad faith, Preferred emphasizes that (1) the transfer of the 10% fractional interest to the Debtor occurred within three days of the Petition Date; (2) no consideration was paid in connection with the transfer; (3) the Debtor has no material assets aside from its fractional interest in the Marina Property; and (4) the Debtor is a long-dormant entity that conducts no business and has no employees.

The Debtor opposes the Motion to Dismiss. Annette offers the following explanation for the multiple Grant Deeds transferring title to the Marina Property:

I executed a deed to Debtor in 2015, but it was not recorded. I thought the deed was previously recorded, but discovered it was not, so in February 2021, the deed was recorded listing Debtor as co-owner of the Property. In summer 2021, at the insistence of counsel and in an abundance of caution due to ... controversy over non-existent injunctions preventing Stuart Rubin's transfer of title to [the] Property, title was deeded out of DLJJ's name. On or about December 9, 2021, I was not a party to any injunction. I executed the deed placing title back in DLJJ's name and caused it to be sent to the Santa Barbara County Recorder's Office.

Annette Decl. at ¶ 13.

The Debtor accuses Preferred of sabotaging the Rubins' attempts to repay the Loan by blocking the Rubins' attempts to sell a different property which would have yielded sales proceeds sufficient for the Rubins to perform under a Forbearance Agreement with Preferred. According to the Debtor, Preferred attempted to bribe a

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contractor so that the contractor would refuse to cooperate with the Rubins in obtaining the release of an injunction that was preventing the sale of the property from closing. To support these allegations, the Debtor requests that the Court take judicial notice of a declaration filed in litigation before the Santa Barbara Superior Court.

Finally, the Debtor asserts that there are "several million dollars of equity" in the Marina Property. Doc. No. 43 at 7. In the event the Court is not inclined to deny the Motion to Dismiss, the Debtor requests that the hearing on the Motion be continued for sixty days, to provide the Debtor an opportunity to file a motion to sell the Marina Property.

In reply to the Debtor's opposition, Preferred argues that the evidence supporting the Debtor's allegations of bribery is inadmissible as hearsay. Preferred further contends that the Debtor's \$32 million valuation of the Marina Property is significantly overstated. Preferred asserts that the Marina Property is worth only \$22–\$23 million, and points to a Broker's Opinion of Value from Cristal Clarke in support of this valuation. Preferred maintains that the indebtedness against the Marina Property is at least \$27 million.

Bank Hapoalim, B.M. ("Bank Hapoalim"), which holds a second priority lien against the Marina Property, joins the Motion to Dismiss. Bank Hapoalim maintains that the Debtor has significantly understated the amount outstanding under its loan. According to Bank Hapoalim, it is owed in excess of \$8.05 million—not \$6.5 million, as represented by the Debtor.

Bank of America, N.A. ("Bank of America"), which holds a first priority lien against the Marina Property, submitted a Statement of Position regarding Preferred's Motion to Dismiss. In the event the Court finds cause for dismissal under § 1112, Bank of America requests that the case be dismissed, as opposed to being converted to Chapter 7. Bank of America states that Annette's execution of the Dec. 2021 Grant Deed violated the due on sale clause in its Deed of Trust.

Daniel Wallace and Hillary Wallace hold a judgment lien against the Marina Property in the amount of \$157,000 and joint the Motion to Dismiss.

Sunset Plaza, a co-obligor on Preferred's Loan against the Marina Property, opposes the Motion to Dismiss. Sunset Plaza argues that creditors would best be served by an order requiring the Debtor to sell the Marina Property by a date certain. Sunset Plaza emphasizes that the Debtor now has the ability to take advantage of § 363 in selling the Marina Property—a situation that did not exist when Sunset Plaza applied for the issuance of a preliminary injunction.

Preferred opposes a § 363 sale of the Marina Property. It asserts that the Marina

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Property is worth between \$22–\$23 million but is subject to outstanding debt of at least \$27 million.

II. Findings of Fact and Conclusions of Law

A. Evidentiary Issues

Before turning to the merits, the Court addresses Preferred's evidentiary objections to Annette's declaration and to the Debtor's Request for Judicial Notice. Annette testifies as to the value of the Marina Property and the amount of outstanding indebtedness encumbering the Marina Property. She also offers her characterization of rulings made by various state courts in litigation between Preferred and the Rubins and/or affiliates of the Rubins. Preferred contends that Annette's declaration is inadmissible as hearsay and on the grounds of lack of foundation and lack of personal knowledge.

Although the Court admits Annette's declaration, it accords the declaration only minimal evidentiary weight. Much of the declaration consists of legal argument recast as testimony. Portions of the declaration that are in reality legal argument disguised as testimony are construed only as legal argument. To the extent that Annette testifies as to the amount of indebtedness encumbering the Marina Property, her testimony has far less weight than contradictory testimony submitted by employees of the banks asserting the indebtedness. To the extent that Annette characterizes rulings made by other courts, the Court relies upon the rulings themselves, rather than Annette's characterization of those rulings.

The Debtor requests that the Court take judicial notice of the *Supplemental Declaration of Patrick C. McGarrigle in Support of Preliminary Injunction* [Doc. No. 42, Ex. H] (the McGarrigle Decl.), which was filed by the Rubins in litigation against Preferred in the Santa Barbara Superior Court. The McGarrigle Decl. is offered to substantiate the Debtor's allegation that Preferred sabotaged the Rubins' attempts to perform under the Forbearance Agreement by attempting to bribe a contractor to refuse to cooperate in the release of an injunction, so that the Rubins would be unable to sell property and repay a portion of Preferred's Loan.

The McGarrigle Decl. was not filed under penalty of perjury before this Court. The Court cannot judicially notice declarations filed in other courts for the purpose of establishing the truth of the claims asserted therein. *See Almont Ambulatory Surgery Ctr., LLC v. UnitedHealth Grp., Inc.*, 99 F. Supp. 3d 1110, 1125 (C.D. Cal. 2015) (stating that the Court "can only take judicial notice of the *existence* of those matters of public record ... but not of the *veracity* of the ... disputed facts contained therein.").

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Even if McGarrigle had submitted a sworn declaration before this Court, his testimony regarding the alleged bribery attempts would be inadmissible as hearsay. McGarrigle is an attorney who represented the Rubins in litigation against Preferred in the Santa Barbara Superior Court. In a declaration filed with that court, McGarrigle testifies that a contractor informed him that Preferred had attempted to bribe the contractor for the purpose of preventing the Rubins from performing under the Forbearance Agreement. This testimony constitutes hearsay not subject to any exception and is not considered by the Court.

B. The Motion to Dismiss is Granted

"Under § 1112(b)(1), a court may dismiss a Chapter 11 bankruptcy case 'for cause,' based on a finding that the petition was filed in bad faith." *Prometheus Health Imaging, Inc. v. UST – United States Tr. (In re Prometheus Health Imaging, Inc.)*, 705 F. App'x 626, 627 (9th Cir. 2017) (citing *In re Marshall*, 721 F.3d 1032, 1047 (9th Cir. 2013)); see also *Marsch v. Marsch (In re Marsch)*, 36 F.3d 825, 828 (9th Cir. 1994) ("Although section 1112(b) does not explicitly require that cases be filed in 'good faith,' courts have overwhelmingly held that a lack of good faith in filing a Chapter 11 petition establishes cause for dismissal"). "While § 1112(b)(4) provides a list of what circumstances may constitute 'cause' for dismissal, the list is non-exhaustive, and 'courts may consider any factors which evidence an intent to abuse the judicial process and the purposes of the reorganization provisions,' to make the bad faith determinations." *In re Prometheus Health Imaging, Inc.*, 705 F. App'x at 627. The existence of good faith "does not depend on one factor alone, but . . . is to be judged by looking at the totality of the circumstances surrounding the case." *In re WLB-RSK Venture*, 296 B.R. 509, 514 (Bankr. C.D. Cal. 2003).

A petition is filed in bad faith if a debtor seeks to "achieve objectives outside the legitimate scope of the bankruptcy laws." *Marsch*, 36 F.3d at 828. To determine whether a debtor has filed a petition in bad faith, courts weigh a variety of circumstantial factors such as whether:

- 1) the debtor has only one asset;
- 2) the debtor has an ongoing business to reorganize;
- 3) there are any unsecured creditors;
- 4) the debtor has any cash flow or sources of income to sustain a plan of reorganization or to make adequate protection payments; and
- 5) the case is essentially a two party dispute capable of prompt

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adjudication in state court.

In re St. Paul Self Storage Ltd. P'ship, 185 B.R. 580, 582–83 (9th Cir. B.A.P. 1995).

A finding of bad faith is made on a case by case basis, there is no list of factors which must be present in each case to make the finding, and the weight given to any particular factor depends on the circumstances of the individual case. *Can-Alta Props., Ltd. v. State Sav. Mortg. Co. (In re Can- Alta Props., Ltd.)*, 87 B.R. 89, 91 (9th Cir. B.A.P. 1988); *Meadowbrook Investors' Group v. Thirtieth Place, Inc. (In re Thirtieth Place)*, 30 B.R. 503, 506 (9th Cir. BAP 1983).

Multiple indicia of bad faith are present here. First, the Debtor's only material asset is its asserted 10% interest in the Marina Property, which the Debtor acquired by way of a Grant Deed that was recorded only two days prior to the Petition Date. (Aside from the Marina Property, the only other assets scheduled by the Debtor consist of cash in the amount of \$23,564.35 and a security deposit in the amount of \$44,000.00.) The Debtor sought bankruptcy protection a mere six hours after Sunset Plaza's attempt to delay the foreclosure sale of the Marina Property had failed. The timing of the petition makes it obvious that the execution of the Dec. 2021 Grant Deed was part of a scheme to further forestall the foreclosure sale in the event that Sunset Plaza's request for a preliminary injunction proved unsuccessful. As explained in *In re Yukon Enterprises, Inc.*, 39 B.R. 919, 921 (Bankr. C.D. Cal. 1984), the "transfer of distressed real property into a newly created or dormant entity" which occurs "within close proximity to the filing of the bankruptcy case" indicates that the case has been filed in bad faith.

Second, the Debtor's unsecured debt of \$239,673.16 is minimal in comparison to debt in excess of \$27 million secured by the Marina Property. This further demonstrates that by filing the petition, the Debtor sought "merely to delay or frustrate the legitimate efforts of secured creditors to enforce their rights," rather than to avail itself of "the purposes of the reorganization provisions." *In re Mense*, 509 B.R. 269, 277 (Bankr. C.D. Cal. 2014).

Third, the Debtor is a shell entity with no ongoing business to reorganize that does not generate any income that could be used to fund a plan of reorganization.

Fourth, the case is a two-party dispute between the Debtor and Preferred that has already been adjudicated in state court. A detailed recitation of the extensive litigation involving Preferred, the Rubins, and entities affiliated with the Rubins—including the Debtor—is set forth in the Memorandum of Decision issued in Sunset Plaza's case [Doc. No. 16, Adv. No. 2:21-ap-01245-ER] and is not repeated herein.

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The Court declines to provide the Debtor additional time to attempt to sell the Marina Property under § 363, as requested by the Debtor and Sunset Plaza. [Note 2] Preferred has established that there is no equity in the Marina Property. The Court finds the testimony of Cristal Clarke regarding the Marina Property's value to be especially persuasive. Clarke is the number one individual real estate agent in the Santa Barbara multiple listing service, is the number one individual real estate agent for Berkshire Hathaway Worldwide (which has 50,000 agents), and has worked as a real estate agent for almost 30 years. Clarke Decl. at ¶ 2. She values the Marina Property at between \$22–\$23 million. She notes that the most expensive sale ever recorded for the Hope Ranch area in which the Marina Property is located was for \$25.3 million, and this sale occurred only after marketing for 225 days. *Id.* at ¶ 10. The universe of potential buyers in the Hope Ranch area is limited because of a “natural volcanic steam vent that omits sulfuric gasses,” resulting in “a smell in Hope Ranch that is particularly pungent at the bluff-top properties,” including the Marina Property. *Id.* at ¶ 9. Total indebtedness against the Marina Property exceeds \$27 million, which means that the Property is underwater by between \$4–\$5 million.

Clarke's testimony further establishes that the rapid sale contemplated by the Debtor and Sunset Plaza is utterly unrealistic. Comparable properties in the Hope Ranch area took between 225 and 410 days to sell. Even if there was equity in the Marina Property (which there is not), there is no reasonable possibility that the Marina Property could sell within the 60-day period contemplated by the Debtor.

C. The Court Will Require the Debtor to Show Cause Why the Court Should Not (1) Enter an Order Granting *In Rem* Relief as to the Marina Property and (2) Imposing a 180-day Re-filing Bar

The Court is concerned that the Debtor, the Rubins, or entities affiliated with the Rubins may continue to attempt to forestall Preferred from exercising its rights against the Marina Property by (1) transferring a further fractional interest in the Marina Property to another entity and causing that entity to seek bankruptcy protection or (2) causing the Debtor to file a new Chapter 11 petition immediately after dismissal of the instant case. Notwithstanding the dismissal, the Court will retain jurisdiction for the purpose of requiring the Debtor to show cause why the Court should not enter an order granting *in rem* relief as to the Marina Property pursuant to § 362(d)(4), on the ground that the filing of the instant petition was part of a scheme to delay, hinder, or defraud creditors involving the transfer of a fractional interest in the Marina Property. *See Aheong v. Mellon Mort'g Co. (In re Aheong)*, 276 B.R. 233, 240 (B.A.P. 9th Cir.

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Central District of California
Los Angeles
Judge Ernest Robles, Presiding
Courtroom 1568 Calendar**

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2002) (authorizing the post-dismissal retention of jurisdiction for the purpose of adjudicating issues pertaining to the automatic stay). The Debtor will also be required to show cause why a 180-day bar against re-filing should not be imposed.

The hearing on the Order to Show Cause shall take place on **February 9, 2022 at 10:00 a.m.** The Debtor, Preferred, and any other interested parties shall file responses to the Order to Show Cause (the "Responses") by no later than **January 26, 2022**. Replies to the Responses shall be filed by no later than **February 2, 2022**.

D. The Court Declines to Set a Hearing Regarding Contempt Sanctions

Local Bankruptcy Rule ("LBR") 9020-1 specifies the procedure for seeking contempt sanctions. Specifically, the party seeking sanctions must apply to the Court for issuance of an order requiring the alleged contemnor to show cause why it should not be held in contempt. The alleged contemnor must be provided the opportunity to object to issuance of an order to show cause. No hearing takes place unless the Court issues an OSC.

These procedures reflect the seriousness which must be accorded to contempt proceedings. As one court has explained:

Obtaining an order to show cause requires a demonstration of facts that, if not rebutted, could be sufficient to warrant an order of contempt. Courts should be cautious when authorizing contempt proceedings. Orders to show cause should not issue merely because someone requests one.

Contempt is serious business that nobody takes lightly. The mere existence of an order to show cause suggests that the court has made a preliminary determination that an order of contempt is a realistic possibility.

Costa v. Welch (In re Costa), 172 B.R. 954, 963 (Bankr. E.D. Cal. 1994).

Preferred's request for contempt sanctions was not made in accordance with the procedure set forth in LBR 9020-1. Therefore, the Court declines to set a hearing regarding the issuance of contempt sanctions at this time.

III. Conclusion

Based upon the foregoing, the Motion to Dismiss is **GRANTED**. The Court will prepare and enter an order granting the Motion to Dismiss and an order setting a hearing on the Order to Show Cause.

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No appearance is required if submitting on the court's tentative ruling. If you intend to submit on the tentative ruling, please contact Landon Foody or Daniel Koontz at 213-894-1522. **If you intend to contest the tentative ruling and appear, please first contact opposing counsel to inform them of your intention to do so.** Should an opposing party file a late opposition or appear at the hearing, the court will determine whether further hearing is required. If you wish to make a telephonic appearance, contact Court Call at 888-882-6878, no later than one hour before the hearing.

Note 1

A given name is used to distinguish Annette Rubin from Stuart Rubin. No disrespect is intended.

Note 2

Sunset Plaza argues that a sale under § 363 could take place notwithstanding an injunction issued by a state court barring Stuart from transferring any interest in the Marina Property. Without deciding the issue, the Court has serious doubts as to whether any of the provisions in § 363(h) or § 363(f)(1)–(5) could be used to authorize a sale of property free and clear of a state court injunction. Even if the Court were to authorize such a sale, the litigation risk associated with the sale order would undoubtedly reduce the sale price, or prevent title insurance from being issued, or both.

Party Information

Debtor(s):

DLJJ & Associates, LLC

Represented By
Michael F Chekian

Trustee(s):

Susan K Seflin (TR)

Pro Se